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STATEMENT OF FACTS

As the case sub judice solely involves questions of law, the facts relevant to deciding this appeal primarily involve the procedural history and prior appellate precedent issued by Ohio courts.

On April 23, 2008, the Ninth District Court of Appeals affirmed the convictions of Defendant-Appellant Jermaine Baker (Baker), concerning a jury verdict finding Baker guilty of, inter alia, Aggravated Robbery and Kidnapping.

During the jury trial, the trial court stated that the verdict forms would ask the jury if they believed Baker had prior criminal convictions; specifically, the trial court opined that since Baker had been " * * * previously convicted of robbery and it has to be a separate finding, I believe, than the weapon under disability." (Trial transcript at page 275) The jury also received as an exhibit, copies of Baker's three prior criminal convictions, presumably to show the jury that Baker could not legally possess a weapon. (State's Exhibits 73, 74, prior convictions for aggravated robbery, Summit County CR 01-07-1809 and 2005 convictions for tampering with evidence and cocaine possession, Summit County CR 05-01-0314.) On direct appeal, Appellant argued that this jury verdict form and copies of three prior convictions constituted plain error, ineffective assistance of counsel, and were violative of *Old Chief v. United States* and Rules of Evidence 403, 404(B). At no point during the jury trial, did Defendant Baker take the witness stand. The Ninth District opinion overruled this assignment of error.

Testimony during trial also indicated that two separate victims were shot by two different assailants. (Trial transcript at pages 54, 57, 119-120, 147-149, 368.) After receiving the guilty

verdicts, the trial court imposed a combined sentence of 32 years of incarceration. (Trial transcript at page 525.) The trial court imposed 12 years on Baker's firearm specification and body armor specification. The trial court multiplied the two-year body armor specification on four different convictions for an eight-year term, and therefore failed to merge the body armor specifications. (Trial transcript at pages 524.)

Appellant argued on appeal that when a specification attaches to multiple offenses that were committed with a singular animus, they must be merged pursuant to Ohio precedent and Ohio Revised Code § 2941.25. The Ninth District opinion held that both issues of merger and an illegal sentence are waived unless trial counsel preserved these errors during the sentencing hearing.

On May 1, 2008, Appellant filed a motion to certify a conflict, per Appellate Rule 25 and Article IV, Section 3(B)(4) of the Ohio Constitution. Appellant's motion asserted that the Ninth District's opinion conflicted with other Ohio appellate districts on three separate questions of law.

On June 5, 2008, Appellant filed a memorandum in support of jurisdiction, asking this Court to assume jurisdiction over the three issues also raised in the motion to certify a conflict, as well as a fourth discretionary issue. Appellant filed that jurisdictional memorandum in Ohio Supreme Court case 2008-1094.

On June 9, 2008, the Ninth District certified that true legal conflicts exists. This Court agreed and -- on September 10, 2008 -- assumed jurisdiction over the instant case. This Court also consolidated the two cases for purposes of briefing, argument, and disposition.

This Court ordered the parties to file briefs answering the following three questions: 1) Does *Old Chief v. United States* (1997), 519 U.S. 172, apply to Ohio, state law, prosecutions?, 2) Are parties required to object to avoid waiver of criminal sentencing issues on appeal?, 3) Is the issue of merger waived if a trial court imposes concurrent sentences?

This Court also appointed appellate counsel for the indigent Appellant, due to this Ninth District's belief that it lacks authority to do so. The clerk of courts filed the record on September 24, 2008. Appellant now files this timely merit brief seeking reversal of three legal holdings of the Ninth District Court of Appeals:

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW I

OLD CHIEF V. UNITED STATES APPLIES TO OHIO, STATE LAW, PROSECUTIONS.

The Ninth District Court of Appeals holds that the U.S. Supreme Court opinion, *Old Chief v. United States*, (1997), 519 U.S. 172, does not apply to Ohio's criminal statutes: "[The defendant's] reliance on *Old Chief* is misplaced for three reasons. First, *Old Chief* construed a federal statute and therefore, is not binding upon this Court's interpretation of an Ohio statute." *State v. Baker*, 2008-Ohio-1909 at ¶12, quoting *State v. Kole*, Lorain App. 98CA007116.

The Ninth District's view directly contradicts the holdings of several other appellate districts. In *State v. Hatfield*, 2007-Ohio-7130, the Eleventh District Court of Appeals adopted the *Old Chief* opinion as controlling on Ohio courts. In the Eleventh District, *Old Chief* is applied, "[p]ursuant to *Old Chief*, we hold the

trial court's evidentiary ruling was an abuse of discretion." *Id* at ¶148.

The Ninth District's holding asserts that Ohio's trial courts and prosecutors are not obliged to honor the holding of *Old Chief*. "[n]either the State nor the trial court is required to accept a defendant's stipulation to a prior conviction." *Baker* at ¶13, citing *State v. Smith*, 68 Ohio App.3d 692, 695. The First District Court of Appeals also applies the *Old Chief* holding to state law criminal cases and then conducts a fact-intensive analysis to see if the facts justify deviating from the *Old Chief* principle: "We must note that R.C. 2921.05 contains no requirement for a conviction—merely the filing or prosecution of charges. But *Old Chief*'s logic still applies." *State v. Simms*, 2004-Ohio-652 at ¶9.

The jury that determined Baker's guilt, received a verdict form mentioning Baker's prior criminal history, the jury also received copies of journal entries informing the jury of three prior -- and completely unrelated -- felony convictions. (Trial transcript at page 275, State's Exhibit 73, State's Exhibit 74) These events disregarded the holding of *Old Chief v. United States*, and also constituted improper propensity evidence under Rules of Evidence 403, 404. As one appellate court explained, "an accused cannot be convicted of one crime by proving he committed other crimes or is a bad person." *State v. Adkins*, 2002-Ohio-3942 at ¶44 citing *State v. Jamison* (1990), 49 Ohio St.3d 182, 184.

One Ohio appellate court relied on the U.S. Supreme Court opinion, when a prior conviction is the element of a criminal charge before a sitting jury, *Old Chief* holds that a ""* * * defendant falls within the category simply by virtue of past conviction for any [qualifying] crime ranging from possession of short lobsters * * * to the most aggravated murder.' The most the jury

needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun * * *." *State v. Riffle*, 2007-Ohio-5299 at ¶30, quoting *Old Chief* at 190-191.

Baker's jury should have only been told that he was ineligible to own a firearm; the jury should not have been given journal entries showing that Baker had three prior criminal convictions -- this only served to prejudice the jury into convicting Baker from his past conduct rather than the accusations in the instant indictment.

Appellant moves this Court to reject the Ninth District opinion and to declare that the U.S. Supreme Court holding of *Old Chief* applies to all Ohio, state law, criminal prosecutions that involve prior convictions as an element of a criminal offense.

PROPOSITION OF LAW II

CRIMINAL SENTENCING ISSUES ARE NOT WAIVED ON APPEAL, EVEN IF A PARTY FAILS TO OBJECT AT THE END OF THE SENTENCING HEARING.

In *State v. Baker*, 2008-Ohio-1909, the Ninth District reiterated its holding that criminal sentencing issues are waived, unless the appealing party objected to the sentence during the imposition of the sentence. "At the outset, we note that Baker raised no objection to his sentence in the trial court. This Court has held that to preserve an alleged error for appeal, a party must timely object and state the specific grounds for the objection." *Id.* at ¶30.

The Eighth District Court of Appeals holds that there is no need to object to a criminal sentence to preserve the issue for appeal: "The state objects to the assertion of this assignment of error, claiming that Fischer waived any error because he did not object or

otherwise call this error to the attention of the trial judge, and that the sentences were concurrent. We disagree." *State v. Fischer* (1977), 52 Ohio App.2d 53, 55.

This Supreme Court has only resolved the issue of objecting to a sentence on grounds of a violation of *Blakely v. Washington* (2004), 542 U.S. 296, but not on other sentencing appeals: "* * * a lack of an objection in the trial court forfeits the *Blakely* issue for purposes of appeal when the sentencing occurred after the announcement of *Blakely*." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642 at ¶31.

The trial court imposed a combined sentence of 32 years -- Appellant asserts that the trial court illegally multiplied Baker's firearm and body armor specifications. (December 14, 2007 nunc pro tunc journal entry of criminal sentence, Trial transcript at pages 524-525.)

The illegal sentence imposed against Baker should not stand because the trial attorney failed to object. As this Court holds, an appellate court has statutory authority to "* * * vacate, modify, or remand an unlawful sentence* * * ." *State v. Evans*, 113 Ohio St.3d 100, 2007-Ohio-861 at ¶10, relying on Ohio Revised Code § 2953.08(G). As one dissenting opinion in the Ninth District noted, "[a] defendant is not required to object to his sentence in order to preserve any errors with the sentence for appeal. [citation omitted]" *State v. Barnes*, 2007-Ohio-2437 at ¶10.

Another Ninth District dissenting opinion recently noted that her district fails to consistently apply its own legal doctrine: "* * * this Court has not been consistent in requiring a defendant either to have objected below or argued plain error before we have addressed the merits of his assignment of error challenging the validity of his sentence." *State v. Douglas*, 2008-Ohio-5568 at ¶22. (Dissenting opinion of Judge Donna Carr.) The dissenting opinion

succinctly opines that an illegal sentence cannot be upheld on the grounds of waiver doctrine: "I would sustain Douglas's second assignment of error solely for the reason that a trial court has no authority to sentence a defendant in excess of the statutory maximum. [citations omitted]" *Id.* at ¶22. The overwhelming legal precedent in Ohio, declares that an illegal sentence is always ripe for appellate review.

Appellant also asserts an important policy argument against the Ninth District holding. Sentencing hearings are, by their nature, tense and potentially dangerous. Emotions run high as often a victim -- and/or the victim's family -- stands in the room with a defendant facing a lengthy prison sentence. According to the Ninth District, a trial attorney must object and argue with the trial judge after the judge pronounces sentence. If a trial attorney is now required to object -- and possibly argue the illegality or impropriety of -- a criminal sentence, it will only serve to further inflame passions that are often present during a sentencing hearing.

Appellant moves this Court to reverse the Ninth District holding and to declare that an illegal sentence is void as a matter of law, and therefore no objection is required to preserve this issue on appeal.

PROPOSITION OF LAW III

THE ISSUE OF MERGER IS REVIEWABLE ON APPEAL EVEN IF THE TRIAL COURT IMPOSED CONCURRENT SENTENCES.

The *State v. Baker* opinion reiterated that the Ninth District " * * has held that 'plain error does not exist when concurrent sentences are imposed for crimes that constitute allied offenses of similar import.' [citation omitted]" *Baker* at ¶31. In contrast, the Second District Court of Appeals holds that two convictions or two sentences that should have merged constitute plain error: "We have previously applied a plain error analysis in cases concerning alleged allied offenses of similar import and found that a defendant's substantial rights are violated by conviction for two felonies rather than one where the offenses are allied offenses of similar import and committed with a single animus. [citations omitted]" *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327 at ¶26. The Second District concluded "[b]ecause kidnapping and aggravated robbery are allied offenses of similar import and because Winn did not commit the two crimes with a separate animus, he could only be convicted of and sentenced for one of those crimes." *Id.* at ¶34.

The Fourth District Court of Appeals holds that multiple convictions for concurrent sentences are plain error -- even if the Defendant pled guilty to both offenses -- and even if the trial court imposed concurrent sentences. In *State v. Taylor*, 2008-Ohio-484, the Fourth District noted that Taylor " * * contends in his first assignment of error that the trial court erred when it entered two convictions for the kidnapping and gross sexual imposition offenses." *Id.* at ¶14. The Fourth District agrees with "the crux of [Appellant's] contention [that], before he entered his

guilty pleas, the court erred when it concluded that the kidnapping and gross sexual imposition offenses were not allied offenses of similar import." *Id.* at ¶16.

The concept that failure to invoke the doctrine of merger is plain error is not a new precedent; Ohio courts have held this view for at least 31 years. In *State v. Fischer* (1977), 52 Ohio App.2d 53, 55 the Eighth District held, "The conviction for two thefts where there was only one is plain error under Crim. R. 52(B)* * *" That opinion noted further: "The state objects to the assertion of this assignment of error, claiming that Fischer waived any error because he did not object or otherwise call this error to the attention of the trial judge, and that the sentences were concurrent. We disagree." *Id.* at 55.

As one appellate court explained, "* * *if there is a singleness of purpose, separate firearm specifications must be merged." *State v. Steward*, 2007-Ohio-5523 at ¶11 relying on Ohio Revised Code § 2941.25, and citing *State v. Harris*, 7th Dist. No. 04 JE 44, 2006-Ohio-3520, at ¶127.

The Second, Fourth, and Eighth appellate districts hold that a trial court's failure to merge convictions and sentences is plain error -- and the Ninth District holds it is not plain error.

Appellant asserts that merger should be reviewed in Baker's case because of the legal precedent previously cited; Appellant also asks this Court to review the instant criminal sentence to show that Baker's sentences were actually consecutive and not concurrent.

The trial court multiplied the two-year body armor specification on four different convictions for an eight-year term, and therefore failed to merge the body armor specifications --

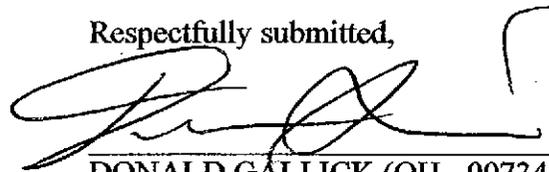
as well as the firearm specifications. (Trial transcript at pages 524-525, December 14, 2007 nunc pro tunc journal entry of criminal sentence.)

Even if this Court were to agree with the Ninth District belief that merger is not reviewable on appeal if concurrent sentences were imposed, the Baker was not given concurrent sentences. Nevertheless, Appellant asks this Court to reverse the Ninth District holding that the issue of merger is not reviewable if it resulted in concurrent sentences.

CONCLUSION

The instant conflict should be resolved in favor of the appellate districts that conflict with the Ninth District. The opinion of the Ninth District should be reversed and remanded with instructions: 1) to apply the holding of *Old Chief v. United States*, 2) to review the legality of Baker's sentence, and 3) to determine if any of Baker's convictions and sentences should have been merged.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this Brief of Appellant and Appendix was sent by regular U.S. to the Office of Sherri Bevan Walsh, Summit County Prosecutor, at 53 University Avenue, Akron, Ohio 44308, on this third day of November, 2008.



DONALD GALLICK (OH - 0073421)
ATTORNEY FOR APPELLANT

APPENDIX

- A. Notice of Appeal, OSC Case 2008-1304.
- B. Order Certifying a Conflict, OSC Case 2008-1094.
- C. State v. Jermaine Baker, App. 23840, 2008-Ohio-1909.
- D. December 14, 2007 nunc pro tunc journal entry of criminal sentence.
- E. Old Chief v. United States.

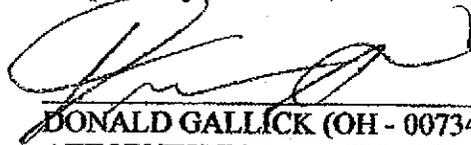
NOTICE OF APPEAL

Defendant-Appellant Jermaine Baker now gives notice of appeal to this Honorable Court of a Claimed Appeal of Right of the Ninth District Court of Appeals opinion, *State v. Jermaine Baker*, Summit App. 23840, Summit trial court case 2007-01-0186(A), involving his felony convictions and 32 year sentence. Appellant asserts that this case involves a felony that raises substantial constitutional questions and should be reviewed by this Court.

The Ninth District opinion was journalized on April 23, 2008. Defendant-Appellant asserts, pursuant to S. Ct. Prac. R. II § 2(B)(1)(d) that the instant case raises substantial constitutional questions under the U.S. and Ohio Constitutions, and also involves felony criminal convictions.

Defendant-Appellant now timely appeals the appellate opinion to this Supreme Court as a case raising substantial constitutional questions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this Notice of Appeal was sent via regular U.S. mail to the Office of to Summit County Prosecutor 53 University Avenue, Akron, Ohio 44308 on this 4 day of June, 2008.



DONALD GALLICK (OH - 0073421)
ATTORNEY FOR APPELLANT

FILED

The Supreme Court of Ohio

SEP 10 2008

COURT OF APPEALS
DANIEL M. HERRIGAN

CLERK OF COURT
SUPREME COURT OF OHIO

2008 SEP 15 AM 10:12

Case No. 2008-1304

State of Ohio

v.

SUMMIT COUNTY
CLERK OF COURTS

ENTRY

Jermaine Baker

This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Summit County. On review of the order certifying a conflict,

It is determined that a conflict exists. The parties are to brief the issues stated at page 1 of the court of appeals' journal entry filed June 11, 2008, as follows:

- (1) Does *Old Chief v. United States* (1997), 519 U.S. 172, apply to Ohio, state law, criminal prosecutions?
- (2) Are parties required to object to avoid waiver of criminal sentencing issues on appeal?
- (3) Is the issue of merger waived if a trial court imposes concurrent sentences?"

It is ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Summit County.

It is further ordered that briefing in Case Nos. 2008-1304 and 2008-1094 shall be consolidated. The parties shall file two originals of each of the briefs permitted under S.Ct.Prac.R. VI and include both case numbers on the cover page of the briefs. The parties shall otherwise comply with the requirements of S.Ct.Prac.R. VI.

It is further ordered by the Court, sua sponte, that Donald Gallick of Akron, Ohio is appointed counsel for appellant.

(Summit County Court of Appeals; No. 23840)



[Handwritten Signature]
 THOMAS J. MOYER
 Chief Justice

I certify this to be a true copy of the original
Daniel M. Herrigan, Clerk of Courts.

[Handwritten Signature]
 Deputy

[Cite as *State v. Baker*, 2008-Ohio-1909.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 23840

Appellee

v.

JERMAINE C. BAKER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 07 01 0186(A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: April 23, 2008

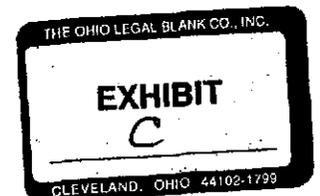
This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MOORE, Judge.

{¶1} Appellant, Jermaine Baker, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On January 12, 2007, Toni Watkins ("Watkins") and Larry Dampier ("Dampier") were at their home on Morgan Ave., in Akron, Ohio with their granddaughter, Ashley Marsh ("Marsh"), Marsh's cousin, Walter Reed ("Reed"), and another family member, Kenny Sharpe ("Sharpe"). Some time after 6:00 p.m., there was a knock at the door and three men barged into the home. Each of the men had a gun. The men started firing their guns shortly after they entered the



home. The men were later identified as Appellant, Jermaine Baker ("Baker"), Edrick Mayfield ("Mayfield") and Anthony Meddley ("Meddley"). During the gunfire, Marsh and Dampier were shot. Reed managed to run upstairs, escape through a window and call the police.

{¶3} The intruders told the victims that they wanted money. Meddley and Mayfield searched the home while Baker held Marsh, Dampier, Sharpe and Watkins at gun point. Baker ordered Sharpe to put tape over Marsh and Watkins' mouths. Dampier's arms were taped together. Watkins' feet were also taped together. The intruders took all four victims' cell phones. The men forced Sharpe into the basement. At some point, the police arrived. After the men obtained several thousand dollars from a safe upstairs, they came downstairs, took money from Dampier's jacket pocket and rings off his fingers. Shortly thereafter, one of the intruders alerted the others that the police were outside. Meddley and Mayfield fled through the back door while Baker remained in the house. After Meddley and Mayfield left, Watkins cut off the duct tape from her feet with a knife she had in her pocket. Watkins, Marsh, Dampier and Sharpe escaped out the front door. The officers first used a megaphone to lure Baker out of the house. They eventually contacted him through his cell phone. After approximately an hour, Baker surrendered. The police ultimately arrested all three intruders. Marsh and Dampier received medical treatment for their wounds. Neither suffered permanent injury.

{¶4} On January 17, 2007, Baker was indicted on several counts including kidnapping, felonious assault, aggravated burglary, aggravated robbery, robbery, having a weapon while under disability and attempted murder. The attempted murder counts were dismissed prior to trial. In addition, Baker was also charged with body armor and firearm specifications. Baker's case proceeded to trial before a jury. On April 27, 2007, the jury convicted Baker on four counts of kidnapping, one count of aggravated burglary, four counts of aggravated robbery, two counts of felonious assault, one count of robbery and one count of having a weapon while under disability. The jury also found Baker guilty of having a firearm and wearing body armor on four of these counts. On April 30, 2007, the trial court sentenced Baker to 32 years of incarceration. Baker timely filed a notice of appeal, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“[BAKER] SUFFERED FROM PLAIN ERROR AND INEFFECTIVE ASSISTANCE OF COUNSEL BY DEFENSE COUNSEL'S FAILURE TO STIPULATE TO THE PRIOR CONVICTION AS REQUIRED BY OLD CHIEF V. UNITED STATES.”

{¶5} In his first assignment of error, Baker contends that his trial counsel's failure to stipulate to his prior conviction constituted ineffective assistance of counsel and plain error. We disagree.

{¶6} A claim of ineffective assistance of counsel requires Baker to satisfy a two prong test. First, he must prove that trial counsel's performance was deficient. *Strickland v. Washington* (1984), 466 U.S. 668, 687. That is, Baker "must show that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed Appellant by the Sixth Amendment." *State v. Srock*, 9th Dist. No. 22812, 2006-Ohio-251, at ¶20, citing *Strickland*, 466 U.S. at 687. Second, Baker must "demonstrate that he was prejudiced by his trial counsel's deficient performance." *Srock*, supra, at ¶21. Prejudice entails "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. Further, this Court need not analyze both prongs of the *Strickland* test if we find that Baker failed to prove either. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10. Finally, Baker must overcome the strong presumption that licensed attorneys in Ohio are competent. *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶7} Pursuant to Crim.R. 52(B), a plain error or defect that affects a substantial right may be noticed although it was not brought to the attention of the trial court. "A plain error must be obvious on the record, such that it should have been apparent to the trial court without objection." *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, at *2, citing *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. As notice of plain error is to be taken with utmost caution and

only to prevent a manifest miscarriage of justice, the decision of a trial court will not be reversed due to plain error unless the defendant has established that the outcome of the trial clearly would have been different but for the alleged error. *Kobelka*, supra, at *2, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, and *State v. Phillips* (1995), 74 Ohio St.3d 72, 83.

{¶8} Baker challenges his trial counsel's failure to stipulate to his prior felony convictions and to, instead, permit the State to publish two copies of his prior felony convictions. One of the copies showed Baker's prior conviction for robbery while the other showed his prior convictions for tampering with evidence and possession of cocaine. However, the trial transcript reflects that Baker's trial counsel stipulated to Baker's prior conviction. We cannot ascertain from the record whether Baker's counsel stipulated to all three convictions or just one conviction. The record reflects that before trial commenced, the State informed the court that Baker's counsel stipulated to Baker's "prior convictions." (Emphasis added.) Baker's counsel then stated on the record "[a]s to the prior conviction, we do stipulate to the fact it is the Jermaine Baker and for purposes of the enhancement charge." (Emphasis added.)

{¶9} Baker's counsel again acknowledged this stipulation during trial, outside the presence of the jury:

"Judge, for the record, there's concern based on the prior crime of violence specification. We had discussed earlier that the finding now has to be made by a jury as opposed to the judge under case law. There's also an indication it's [sic] been developed around here

that the jury makes two separate findings. First guilty without consideration of the prior crime of violence spec, they then determine that later.

“The problem, and I think the reason that doesn’t sound so the jury doesn’t here [sic] about the prior conviction. However, in this case given the prior conviction has been stipulated to and it is an element of the weapons under disability charge and the jury’s already heard it, I would waive any appeal argument as far as allowing them to have that instruction on the repeat violent offender along with the other specifications instructions.”

Although Baker’s counsel did not specifically identify the conviction to which he was referring in the above colloquy, we can deduce that he was referencing Baker’s prior conviction for robbery, in violation of R.C. 2911.01, which constitutes a crime of violence. R.C. 2901.01(A)(9).

{¶10} The record also reflects that at the close of the State’s case, the State moved to admit certified copies of Baker’s prior convictions. With regard to these exhibits, the court stated:

“Ladies and gentlemen, what they’re [the State] handing me are *** [a] certified copy of the conviction from 2001 indicating that Jermaine Baker has previously been convicted of the crime of robbery. And case stated from 2005 indicating that Mr. Baker has been found guilty or pled guilty to the charge of tampering with evidence and possession of cocaine, which is from my Court. The prosecution is resting its case.”

Baker raised no objection to the admission of these exhibits.

{¶11} In support of his argument, Baker has relied upon *Old Chief v. United States* (1997), 519 U.S. 172. This Court has previously discussed the

impact of *Old Chief* on the State's ability to refuse to accept a stipulation, holding as follows:

“[The defendant’s] reliance on *Old Chief* is misplaced for three reasons. First, *Old Chief* construed a federal statute and, therefore, is not binding upon this Court’s interpretation of an Ohio statute. Second, unlike *Kole*, the defendant in *Old Chief* timely objected to the prosecution’s introduction of his prior conviction into evidence. Third, the federal statute construed in *Old Chief* is facially dissimilar to the Ohio statute in the case at bar. In *Old Chief* the charge was assault with a dangerous weapon in violation of 18 U.S.C. 922(g)(1) which makes it unlawful for any person ‘who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year [to] possess * * * any firearm.’ In the instant case, an essential element of the indicted offense of having a weapon while under disability is whether the individual possessing the weapon was previously convicted of a felony offense of violence. Unlike the federal statute in *Old Chief*, evidence concerning the name or nature of [the defendant’s] prior conviction was necessary in order for the jury to find [him] guilty of the charged offense. In order to prove the offense of having a weapon while under a disability the state was required to prove the prior conviction beyond a reasonable doubt.” (Internal citations omitted.) *State v. Kole* (June 28, 2000), 9th Dist. No. 98CA007116, at *4, overruled on other grounds by *State v. Kole* (2001), 92 Ohio St.3d 303.

{¶12} Baker was charged with having a weapon while under disability, pursuant to R.C. 2923.13(A)(2)/(A)(3). Accordingly, the State had to prove beyond a reasonable doubt that Baker was under a disability. Under Ohio law, “[n]either the state nor the trial court is required to accept a defendant’s stipulation as to the existence of the conviction.” *State v. Smith* (1990), 68 Ohio App.3d 692, 695. See *State v. Twyford* (2002), 94 Ohio St.3d 340, 359. Under R.C. 2923.13(A)(2)/(A)(3), a disability is defined as a prior conviction for a felony of violence or a conviction “of any offense involving the illegal possession, use, sale,

administration, distribution, or trafficking in any drug of abuse[.]” Robbery constitutes a felony of violence. R.C. 2901.01(A)(9). Possession of cocaine constitutes a disability under R.C. 2923.13(A)(3). Consequently, Baker’s prior convictions for robbery and possession of cocaine were admissible to prove an element of that offense.

{¶13} It appears from the record that Baker’s counsel stipulated to at least one if not all of his prior convictions. However, even if Baker’s counsel did not stipulate to all three prior convictions, and the exhibits were given to the jury, Baker has failed to demonstrate error. Neither the State nor the trial court is required to accept a defendant’s stipulation to a prior conviction. *Smith*, 68 Ohio App.3d at 695. The decision of counsel as to whether to stipulate to a prior conviction is a tactical one. Counsel’s strategic decisions and trial tactics, even if debatable, normally do not constitute grounds for an ineffectiveness claim, eliminating the “distorting effect of hindsight.” *State v. Post* (1987), 32 Ohio St.3d 380, 388.

{¶14} Further, Baker has failed to demonstrate that the admission of these convictions affected a substantial right, nor has he established that the outcome of the trial clearly would have been different but for the admission of these exhibits. *Kobelka*, supra, at *2, citing *Waddell*, 75 Ohio St.3d at 166, and *Phillips*, 74 Ohio St.3d at 83. This Court has previously held that the admission of “two previous convictions of violence to prove four counts of having a weapon under disability

was not unduly prejudicial.” *State v. Caldwell* (Dec. 4, 1991), 9th Dist. No. 14720, at *6. Consequently, we find that, even if these exhibits were given to the jury, Baker has not been unduly prejudiced.

{¶15} Accordingly, Baker’s first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“THE SECOND CONVICTION FOR FELONIOUS ASSAULT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE TESTIMONY AND EXHIBITS SHOW THAT THE TWO VICTIMS WERE SHOT BY TWO DIFFERENT ASSAILANTS.”

{¶16} In his second assignment of error, Baker asserts that his second conviction for felonious assault was not supported by sufficient evidence and was against the weight of the evidence because the testimony and exhibits show that the two victims were shot by two different assailants. We disagree.

{¶17} Crim.R. 29(A) provides that a trial court “shall order the entry of a judgment of acquittal *** if the evidence is insufficient to sustain a conviction of such offense or offenses.” A trial court may not grant an acquittal by authority of Crim.R. 29(A) if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt. *State v. Wolfe* (1988), 51 Ohio App.3d 215, 216. In making this determination, all evidence must be construed in a light most favorable to the prosecution. *Id.*

{¶18} “While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion.” *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). Further,

“[b]ecause sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.” (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at *2.

Therefore, we will address Baker’s claim that his conviction was against the manifest weight of the evidence first, as it is dispositive of his claim of insufficiency.

{¶19} When a defendant asserts that his conviction is against the manifest weight of the evidence,

“an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *Id.*

{¶20} Baker was convicted of two counts of felonious assault, in violation of R.C. 2903.11(A)(1)(A)(2), felonies of the second degree. Pursuant to R.C. 2903.11,

“(A) No person shall knowingly do either of the following:

“(1) Cause serious physical harm to another or to another’s unborn;

“(2) Cause or attempt to cause physical harm to another or to another’s unborn by means of a deadly weapon or dangerous ordnance.”

{¶21} On appeal, Baker contends that he should have been convicted of only one count of felonious assault. He contends that the testimony and exhibits show that the two victims were shot by two different assailants. Baker concedes that he shot one of the victims. He asserts that “[t]he State did not meet its burden of production to show that [he] shot *both* victims.” (Emphasis added.)

{¶22} The Ohio Supreme Court has held that “a defendant charged with an offense may be convicted of that offense upon proof that he was complicit in its commission, even though the indictment is stated in terms of the principal offense and does not mention complicity.” (Quotations and alterations omitted.) *State v. Herring* (2002), 94 Ohio St.3d 246, 251. R.C. 2923.03(F) puts defendants on notice that the jury may be instructed on complicity, even when the charge is stated in terms of the principal offense. *Id.* Specifically, R.C. 2923.03(F) provides that “[a] charge of complicity may be stated in terms of this section, or in terms of the principal offense.”

{¶23} The journal entry in this case does not mention that Baker was convicted of aiding and abetting. However, in a similar case wherein a trial court failed to reference complicity in its journal entry, this Court held that:

“It was not necessary that the court mention aiding and abetting in its entry. One who is guilty of complicity shall be prosecuted and punished as a principal offender. The state may charge and try an aider and abetter as a principal and if the evidence at trial indicates aiding and abetting rather than the principal offense, a jury instruction regarding complicity may be given.” (Internal citations omitted.) *In re Bickley* (June 23, 1993), 9th Dist. No. 15974, at *1.

{¶24} The record reflects that the jury was instructed on aiding and abetting. The following is a portion of the instruction given:

“Complicity. In considering the crimes charged in the indictment, there is an additional proposition that you need to understand and consider: The concept of complicity as an aider or abettor.

“Aided or abetted means conspire, supported, assisted, encouraged, cooperated with, advised or incited.

“A person who knowingly aids, abets or conspires with, directs or associates himself with another either for the purpose of committing or in the commission of a crime is regarded as if he were the principal offender and is just as guilty as if he personally performed every act constituting the offenses or specifications.

“When two or more persons have a common purpose to commit a crime and one does one part and the second performs another, those acting together are equally guilty of the crime.”

{¶25} The testimony at trial reflects that the three men armed themselves with firearms and went to Dampier’s home to steal marijuana. The men barged into the home. Marsh and Dampier were shot. Marsh testified that Baker was “the ruler or whatever” and was “telling [Meddley and Mayfield] what to do.”

Marsh further testified that “Baker was in charge of everything.” Watkins also testified that Baker seemed to be in charge of the home invasion. Meddley similarly testified that Baker was the leader of the home invasion.

{¶26} Even if Baker did not shoot both victims, there was ample evidence that Baker supported, assisted, encouraged, cooperated with, advised or incited with the other shooter. See *State v. Scott*, 8th Dist. No. 87942, 2007-Ohio-528, at ¶18 (explaining that the fact that the bullet that entered the victim came from a .38 caliber pistol, rather than the shotgun that the appellant allegedly carried during the incident, was irrelevant under an aiding and abetting theory); *State v. Barnett*, 8th Dist. No. 81101, 2003-Ohio-3938, at ¶10 (holding that, even though the defendant was charged as a principal, the law permitted him to be found guilty of aiding and abetting a felonious assault with a firearm). We find, therefore, that the jury’s verdict convicting Baker on two counts of felonious assault was not against the weight of the evidence.

{¶27} As this Court has disposed of Baker’s challenge to the weight of the evidence, we similarly dispose of his challenge to its sufficiency. *Roberts*, supra, at *2. Necessarily included in this court’s determination that the jury verdict was not against the manifest weight of the evidence, is a determination that the evidence was also sufficient to support the conviction. *Id.*

{¶28} Baker’s second assignment of error is overruled.

ASSIGNMENT OF ERROR III

“THE SENTENCE IS VOID AS A MATTER OF LAW BECAUSE THE SPECIFICATION PENALTIES WERE MULTIPLIED INSTEAD OF MERGED.”

{¶29} In his third assignment of error, Baker argues that his sentence is void as a matter of law because the specification penalties were multiplied instead of merged. We find no merit in this contention.

{¶30} At the outset, we note that Baker raised no objection to his sentence in the trial court. This Court has held that to preserve an alleged error for appeal, a party must timely object and state the specific grounds for the objection. *State v. Dudukovich*, 9th Dist. No. 05CA008729, 2006-Ohio-1309, at ¶24; *State v. Duffield*, 9th Dist. No. 22634, 2006-Ohio-1823, at ¶74. Typically, if a party forfeits an objection in the trial court, reviewing courts may notice only “[p]lain errors or defects affecting substantial rights.” Crim.R. 52(B). Within this assignment of error, Baker has asserted that the trial court’s imposition of a greater sentence than permitted by Ohio law is plain error.

{¶31} The only specific argument Baker makes with regard to his sentence concerns the court’s order regarding Counts 11, 12, 13, and 14. However, the record reflects that the trial court ordered that Baker serve the sentence regarding Counts 11, 12, 13 and 14 concurrently with the remaining sentence imposed. Counts 11, 12, 13 and 14 were aggravated robbery charges for each of the four victims. “This Court has held that ‘plain error does not exist when concurrent sentences are imposed for crimes that constitute allied offenses of similar

import.”” *State v. Wharton*, 9th Dist. No. 23300, 2007-Ohio-1817, at ¶7, quoting *State v. Iacona* (Mar. 15, 2000), 9th Dist. No. CA2891-M, at *22. Accordingly, Baker has failed to demonstrate prejudice. Even if the trial court erred in multiplying the specifications attached to Counts 11, 12, 13 and 14 instead of merging these specifications, his sentence would remain the same as the sentence was run concurrently, not consecutively, with the rest of the sentence.

{¶32} Baker’s third assignment of error is overruled.

III.

{¶33} Baker’s assignments of error are overruled, and the judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

SLABY, J.
CONCURS

CARR, P. J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶34} I concur in the majority's decision regarding the first and second assignments of error.

{¶35} I dissent, however, in regard to the third assignment of error. The majority finds no error only because Baker has failed to demonstrate that he was prejudiced by the imposition of concurrent sentences regarding the specifications attached to counts 11 through 14. However, "regardless of whether the sentences are made to run concurrently, a defendant has a substantial stake in each and every one of his convictions." *State v. Martin* (Feb. 9, 1999), 9th Dist. No. 18715 (Carr, J., dissenting in part and concurring in part). The Ohio Supreme Court stated that "[g]iven the numerous adverse collateral consequences imposed upon convicted felons, it is clear to us that a person convicted of a felony has a substantial stake in the judgment of conviction[.]" *State v. Golston* (1994), 71 Ohio St.3d 224, 227.

APPEARANCES:

DONALD GALLICK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY,
Assistant Prosecuting Attorney, for Appellee.

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO DANIEL M. HORRIGAN)
vs.)

Case No. CR 07 01 0186 (A)

2007 DEC 14 AM 8:43)

JERMAINE C BAKER)
(page 1 of 4))
SUMMIT COUNTY)
CLERK OF COURTS)

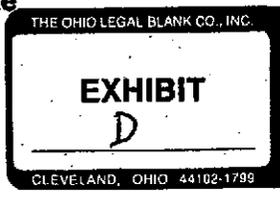
JOURNAL ENTRY

On December 11, 2007, the Court orders that this Journal Entry be filed NUNC PRO TUNC to correct the Journal Entry dated July 19, 2007 to read as follows:

On April 30, 2007 the Prosecuting Attorney and the Defendant appeared with counsel for sentencing. On January 26, 2007, the Defendant entered a plea of Not Guilty to the charges in the indictment stemming from offenses occurring on January 12, 2007. On April 27, 2007 the Defendant was found GUILTY by jury trial of the following charges:

- 1) Counts 1, 2, 3, and 4, Kidnapping,
 - 2) Specification 1 to Counts 1, 2, 3 and 4
 - 3) Specification 2 to Counts 1, 2, 3 and 4
 - 4) Specification 3 of the Supplement 1 to Counts 1, 2, 3 and 4
 - 5) Count 9, Aggravated Burglary,
 - 6) Specification 1 to Count 9
 - 7) Specification 2 to Count 9
 - 8) Specification 3 of the Supplement 1 to Count 9
 - 9) Counts 11, 12, 13 and 14, Aggravated Robbery,
 - 10) Specification 1 to Counts 11, 12, 13 and 14
 - 11) Specification 2 to Counts 11, 12, 13 and 14
 - 12) Specification 3 of the Supplement 1 to Counts 11, 12, 13 and 14
 - 13) Counts 23 and 24, Felonious Assault,
 - 14) Specification 1 to Counts 23 and 24
 - 15) Specification 2 to Counts 23 and 24
 - 16) Specification 3 of the Supplement 1 to Counts 23 and 24
 - 17) Count 27, Robbery,
 - 18) Count 29, Having Weapons While Under Disability
- The offense(s) occurred after July 1, 1996.

The following counts and specifications were dismissed prior to the conclusion of the trial:



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- 1) Counts 19 and 20, Attempted Murder**
- 2) Count 28, Endangering Children**
- 3) Specification 1 to Counts 19 and 20**
- 4) Specification 2 To Counts 19 and 20**
- 5) Specification 3 of the Supplement 1 to Counts 19 and 20**

The Court further finds the following pursuant to O.R.C. 2929.13(B):

- (1) not to sentence the Defendant to a period of incarceration would not adequately protect society from future crimes by the Defendant, and would demean the seriousness of the offense; AND

The Court further finds the Defendant is not amenable to community control and that prison is consistent with the purposes of O.R.C. 2929.11.

The Defendant is to be committed to the Ohio Department Of Rehabilitation And Correction for punishment of the crimes of:

- 1) Counts 1, 2, 3 and 4, Kidnapping, Ohio Revised Code Section 2905.01(A)(2)/(A)(3), felonies of the first (1st) degree, for a definite term of Three (3) years on each count;
- 2) Specification 1 to Counts 1, 2, 3 and 4, for a mandatory Three (3) year sentence on each specification;
- 3) Specification 3 of the Supplement 1 to Counts 1, 2, 3 and 4, for a mandatory Two (2) year sentence on each specification;
- 4) Count 9, Aggravated Burglary, Ohio Revised Code Section 2911.11(A)(1)/(A)(2), a felony of the first (1st) degree, for a definite term of Three (3) years;
- 5) Specification 1 to Count 9, for a mandatory Three (3) year sentence;
- 6) Specification 3 of the Supplement 1 to Count 9, for a mandatory Two (2) year sentence;
- 7) Counts 11, 12, 13 and 14, Aggravated Robbery, Ohio Revised Code Section 2911.01(A)(1)/(A)(3), felonies of the first (1st) degree, for a definite term of Three (3) years on each count;
- 8) Specification 1 to Counts 11, 12, 13 and 14, for a mandatory Three (3) year sentence on each specification;
- 9) Specification 3 of the Supplement 1 to Counts 11, 12, 13, and 14, for a mandatory Two (2) year sentence on each specification;
- 10) Counts 23 and 24, Felonious Assault, Ohio Revised Code Section 2903.11(A)(1)/(A)(2), felonies of the second (2nd) degree, for a definite term of Three (3) years on each count;

**IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT**

THE STATE OF OHIO
vs.

JERMAINE C BAKER
(page 3 of 4)

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Case No. CR 07 01 0186 (A)

JOURNAL ENTRY

- 11) Specification 1 to Counts 23 and 24, for a mandatory Three (3) year sentence on each specification;
- 12) Specification 3 of the Supplement 1 to Counts 23 and 24, for a mandatory Two (2) year sentence on each specification
- 13) Count 27, Robbery, Ohio Revised Code Section 2911.02(A)(2), a felony of the second (2nd) degree, for a definite term Four (4) years;
- 14) Count 29, Having Weapons While Under Disability, Ohio Revised Code Section 2923.13(A)(2)/(A)(3), a felony of the third (3rd) degree, for a definite term Four (4) years.

Pursuant to the above sentence, the Defendant shall be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

Because of the nature of the other sentences, the Court does not sentence the Defendant on the Specification 2 to Counts 1, 2, 3, 4, 9, 11, 12, 13, 14, 23 and 24.

The Three (3) year mandatory sentences for the Specification 1 to Counts 1, 2, 3 and 4 are to be served consecutively with each other and Counts 1, 2, 3 and 4.

The Two (2) year mandatory sentences for the Specification 3 to Counts 1, 2, 3 and 4 are to be served consecutively with each other, Counts 1, 2, 3 and 4, and the Specification 1 on Counts 1, 2, 3 and 4.

Counts 1, 2, 3, and 4 are to be served consecutively with each other.

Count 9 is to be served consecutively with the Specifications 1 and 3 to Count 9, but concurrently with Counts 1, 2, 3, 4, and the Specifications 1 and 3 to Counts 1, 2, 3 and 4.

Counts 11, 12, 13, and 14 are to be served consecutively with each other and the Specifications 1 and 3 to Counts 11, 12, 13 and 14, but concurrently with Counts 1, 2, 3, 4, and the Specifications 1 and 3 to Counts 1, 2, 3 and 4.

Counts 23 and 24 are to be served consecutively with each other and the Specifications 1 and 3 to Counts 23 and 24, but concurrently with Counts 1, 2, 3, 4, and the Specifications 1 and 3 to Counts 1, 2, 3 and 4.

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Counts 27 and 29 are to be served consecutively with each other, but concurrently with Counts 1, 2, 3 and 4.

The Defendant is to serve a total of Thirty-Two (32) years in the Ohio Department of Rehabilitation and Correction with parole eligibility after Twenty (20) years.

As part of the sentence in this case, the Defendant shall be supervised by the Adult Parole Authority after Defendant leaves prison, which is referred to as post-release control, for up to Five (5) years as determined by the Adult Parole Authority.

If the Defendant violates post-release control supervision or any of its conditions, the Adult Parole Authority may impose a prison term, as part of the sentence, of up to Nine (9) months, with a maximum for repeated violations of Fifty percent (50%) of the stated prison term. If the Defendant commits a new felony while subject to post-release control, the Defendant may be sent to prison for the remaining post-release control period or Twelve (12) months, whichever is greater. This prison term shall be served consecutively to any prison term imposed for the new felony of which the Defendant is convicted.

Credit for all time served is to be calculated by the Summit County Adult Probation Department, and will be forthcoming in a subsequent journal entry.

The Court informed the Defendant of the right to appeal pursuant to Rule 32A2, Criminal Rules of Procedure, Ohio Supreme Court. The Court appoints Donald Gallick as counsel to represent the said Defendant for purposes of appeal due to said Defendant's indigency.

APPROVED:
July 20, 2007
tms



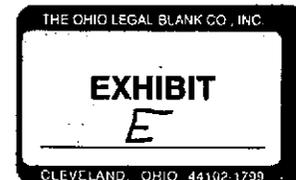
ELINORE MARSH STORMER, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Becky Doherty/Charlene Hardy
Criminal Assignment
Attorney Patrick Summers #13
Attorney Donald Gallick
Adult Probation Department
Registrar's Office
Court Convey



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U.S. Supreme Court

OLD CHIEF v. UNITED STATES, ___ U.S. ___ (1997)

**OLD CHIEF
v.
UNITED STATES**

**Certiorari to the United States Court of Appeals for the Ninth Circuit.
No. 95-6556.**

Argued October 16, 1996

Decided January 7, 1997

After a fracas involving at least one gunshot, petitioner, Old Chief, was charged with, inter alia, violating 18 U. S. C. Section(s) 922(g)(1), which prohibits possession of a firearm by anyone with a prior felony conviction. He offered to stipulate to Section(s) 922(g)(1)'s prior-conviction element, arguing that his offer rendered evidence of the name and nature of his prior offense—assault causing serious bodily injury—inadmissible because its "probative value [was] substantially outweighed by the danger of unfair prejudice . . .," Fed. Rule Evid. 403. The Government refused to join the stipulation, however, insisting on its right to present its own evidence of the prior conviction, and the District Court agreed. At trial, the Government introduced the judgment record for the prior conviction, and a jury convicted Old Chief. In affirming the conviction, the Court of Appeals found that the Government was entitled to introduce probative evidence to prove the prior offense regardless of the stipulation offer.

Held:

A district court abuses its discretion under Rule 403 if it spurns a defendant's offer to concede a prior judgment and admits the full judgment record over the defendant's objection, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction. Pp. 5-21.

(a) Contrary to Old Chief's position, the name of his prior offense as contained in the official record is relevant to the prior-conviction element. That record made his Section(s) 922(g)(1) status "more probable . . . than it [would have been] without the evidence," Fed. Rule Evid. 401; and the availability of alternative proofs, such as his admission, did not affect its evidentiary relevance, see Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U. S. C. App., p. 859. Pp. 5-7.

(b) As to a criminal defendant, Rule 403's term "unfair prejudice" speaks to the capacity of some concededly relevant

evidence to lure the factfinder into declaring guilt on an improper basis rather than on proof specific to the offense charged. Such improper grounds certainly include generalizing from a past bad act that a defendant is by propensity the probable perpetrator of the current crime. Thus, Rule 403 requires that the relative probative value of prior-conviction evidence be balanced against its prejudicial risk of misuse. A judge should balance these factors not only for the item in question but also for any actually available substitutes. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. Pp. 7-13.

and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice whenever the official record would be arresting enough to lure a juror into a sequence of bad-character reasoning. Old Chief sensibly worried about the prejudicial effect of his prior offense. His proffered admission also presented the District Court with alternative, relevant, admissible, and seemingly conclusive, evidence of the prior conviction. Thus, while the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation of admission. Pp. 13-14.

(d) Old Chief's offer supplied evidentiary value at least equivalent to what the Government's own evidence carried. The accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away has virtually no application when the point at issue is a defendant's legal status. Here, the most the jury needed to know was that the conviction admitted fell within the class of crimes that Congress thought should bar a convict from possessing a gun. More obviously, the proof of status went to an element entirely outside the natural sequence of what Old Chief was charged with thinking and doing to commit the current offense. Since there was no cognizable difference between the evidentiary significance of the admission and the official record's legitimately probative component, and since the functions of the competing evidence were distinguishable only by the risk inherent in the one and wholly absent from the other, the only reasonable conclusion was that the risk of unfair prejudice substantially outweighed the conviction record's discounted probative value. Thus, it was an abuse of discretion to admit the conviction record when the defendant admission was available. Pp. 15-21. 56 F. 3d 75, reversed and remanded.

Souter, J., delivered the opinion of the Court, in which Stevens, Kennedy, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed a dissenting opinion, in which Rehnquist, C. J., and Scalia and Thomas, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

No. 95-6556

JOHNNY LYNN OLD CHIEF,

PETITIONER

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

January 7, 1997

Justice Souter delivered the opinion of the Court.

Subject to certain limitations, 18 U. S. C. Section(s) 922(g)(1) prohibits possession of a firearm by anyone with a prior felony conviction, which the government can prove by introducing a record of judgment or similar evidence identifying the

previous offense. Fearing prejudice if the jury learns the nature of the earlier crime, defendants sometimes seek to avoid such an informative disclosure by offering to concede the fact of the prior conviction. The issue here is whether a district court abuses its discretion if it spurns such an offer and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction. 1 We hold that it does.

I.

In 1993, petitioner, Old Chief, was arrested after a fracas involving at least one gunshot. The ensuing federal charges included not only assault with a dangerous weapon and using a firearm in relation to a crime of violence but violation of 18 U. S. C. Section(s) 922(g)(1). This statute makes it unlawful for anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm" "[A] crime punishable by imprisonment for a term exceeding one year" is defined to exclude "any Federal or State offense: pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" and "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U. S. C. Section(s) 921(a)(20).

The earlier crime charged in the indictment against Old Chief was assault causing serious bodily injury. Before trial, he moved for an order requiring the government "to refrain from mentioning-by reading the Indictment, during jury selection, in opening statement, or closing argument-and to refrain from offering into evidence or soliciting any testimony from any witness regarding the prior criminal convictions of the Defendant, except to state that the Defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year." App. 6. He said that revealing the name and nature of his prior assault conviction would unfairly tax the jury's capacity to hold the Government to its burden of proof beyond a reasonable doubt on current charges of assault, possession, and violence with a firearm, and he offered to "solve the problem here by stipulating, agreeing and requesting the Court to instruct the jury that he has been convicted of a crime punishable by imprisonment exceeding one (1) year[]." App. 7. He argued that the offer to stipulate to the fact of the prior conviction rendered evidence of the name and nature of the offense inadmissible under Rule 403 of the Federal Rules of Evidence, the danger being that unfair prejudice from that evidence would substantially outweigh its probative value. He also proposed this jury instruction:

"The phrase 'crime punishable by imprisonment for a term exceeding one year' generally means a crime which is a felony. The phrase does not include any state offense classified by the laws of that state as a misdemeanor and punishable by a term of imprisonment of two years or less and certain crimes concerning the regulation of business practices.

"[I] hereby instruct you that Defendant JOHNNY LYNN OLD CHIEF has been convicted of a crime punishable by imprisonment for a term exceeding one year." App. 11. 2

The Assistant United States Attorney refused to join in a stipulation, insisting on his right to prove his case his own way, and the District Court agreed, ruling orally that, "If he doesn't want to stipulate, he doesn't have to." App. 15-16. At trial, over renewed objection, the Government introduced the order of judgment and commitment for Old Chief's prior conviction. This document disclosed that on December 18, 1988, he "did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury," for which Old Chief was sentenced to five years' imprisonment. App. 18-19. The jury found Old Chief guilty on all counts, and he appealed.

The Ninth Circuit addressed the point with brevity:

"Regardless of the defendant's offer to stipulate, the government is entitled to prove a prior felony offense through introduction of probative evidence. See *United States v. Breikreutz*, 8 F. 3d 688, 690 (9th Cir. 1993) (citing *United States v. Gilman*, 684 F. 2d 616, 622 (9th Cir. 1982)). Under Ninth Circuit law, a stipulation is not proof, and, thus, has no place in the FRE 403 balancing process. *Breikreutz*, 8 F. 3d at 691-92.

"Thus, we hold that the district court did not abuse its discretion by allowing the prosecution to introduce evidence of Old Chief's prior conviction to prove that element of the unlawful possession charge." No. 94-30277, 1995 WL 325745, *1 (CA9, May 31, 1995) (unpublished), App. 50-51.

We granted Old Chief's petition for writ of certiorari because the Courts of Appeals have divided sharply in their treatment of defendants' efforts to exclude evidence of the names and natures of prior offenses in cases like this. Compare, e.g., *United States v. Burkhart*, 545 F. 2d 14, 15 (CA6 1976); *United States v. Smith*, 520 F. 2d 544, 548 (CA8 1975), cert. denied, 429 U.S. 925 (1976); and *United States v. Breitreutz*, 8 F. 3d 688, 690-692 (CA9 1993) (each recognizing a right on the part of the Government to refuse an offered stipulation and proceed with its own evidence of the prior offense) with *United States v. Tavares*, 21 F. 3d 1, 3-5 (CA1 1994) (en banc); *United States v. Poore*, 594 F. 2d 39, 40-43 (CA4 1979); *United States v. Wacker*, 72 F. 3d 1453, 1472-1473 (CA10 1995); and *United States v. Jones*, 67 F. 3d 320, 322-325 (CA9 1995) (each holding that the defendant's offer to stipulate to or to admit to the prior conviction triggers an obligation of the district court to eliminate the name and nature of the underlying offense from the case by one means or another). We now reverse the judgment of the Ninth Circuit.

II.

A.

As a threshold matter, there is Old Chief's erroneous argument that the name of his prior offense as contained in the record of conviction is irrelevant to the prior-conviction element, and for that reason inadmissible under Rule 402 of the Federal Rules of Evidence. 3 Rule 401 defines relevant evidence as having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rule Evid. 401. To be sure, the fact that Old Chief's prior conviction was for assault resulting in serious bodily injury rather than, say, for theft was not itself an ultimate fact, as if the statute had specifically required proof of injurious assault. But its demonstration was a step on one evidentiary route to the ultimate fact, since it served to place Old Chief within a particular sub-class of offenders for whom firearms possession is outlawed by Section(s) 922(g)(1). A documentary record of the conviction for that named offense was thus relevant evidence in making Old Chief's Section(s) 922(g)(1) status more probable than it would have been without the evidence.

Nor was its evidentiary relevance under Rule 401 affected by the availability of alternative proofs of the element to which it went, such as an admission by Old Chief that he had been convicted of a crime "punishable by imprisonment for a term exceeding one year" within the meaning of the statute. The 1972 Advisory Committee Notes to Rule 401 make this point directly:

"The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute." Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U. S. C. App., p. 859.

If, then, relevant evidence is inadmissible in the presence of other evidence related to it, its exclusion must rest not on the ground that the other evidence has rendered it "irrelevant," but on its character as unfairly prejudicial, cumulative or the like, its relevance notwithstanding. 4

B.

The principal issue is the scope of a trial judge's discretion under Rule 403, which authorizes exclusion of relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. Rule Evid. 403. Old Chief relies on the danger of unfair prejudice. 5

1.

The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, *Weinstein's Evidence*, Para(s) 40303. (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U. S. C. App., p. 860.

Such improper grounds certainly include the one that Old Chief points to here: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily). As then-Judge Breyer put it, "Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged-or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment-creates a prejudicial effect that outweighs ordinary relevance." *United States v. Moccia*, 681 F. 2d 61, 63 (CA1 1982). Justice Jackson described how the law has handled this risk:

"Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U. S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michelson v. United States*, 335 U.S. 469, 475-476 (1948) (footnotes omitted).

Rule of Evidence 404(b) reflects this common law tradition by addressing propensity reasoning directly: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. Rule Evid. 404(b). There is, accordingly, no question that propensity would be an "improper basis" for conviction and that evidence of a prior conviction is subject to analysis under Rule 403 for relative probative value and for prejudicial risk of misuse as propensity evidence. Cf. 1 J. Strong, *McCormick on Evidence* 780 (4th ed. 1992) (hereinafter *McCormick*) (Rule 403 prejudice may occur, for example, when "evidence of convictions for prior, unrelated crimes may lead a juror to think that since the defendant already has a criminal record, an erroneous conviction would not be quite as serious as would otherwise be the case").

As for the analytical method to be used in Rule 403 balancing, two basic possibilities present themselves. An item of evidence might be viewed as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded. Or the question of admissibility might be seen as inviting further comparisons to take account of the full evidentiary context of the case as the court understands it when the ruling must be made. 6 This second approach would start out like the first but be ready to go further. On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. As we will explain later on, the judge would have to make these calculations with an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case, and the mere fact that two pieces of evidence might go to the same point would not, of course, necessarily mean that only one of them might come in. It would only mean that a judge applying Rule 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point. Even under this second approach, as we explain below, a defendant's Rule 403 objection offering to concede a point generally cannot

prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense. See *infra*, at 7

The first understanding of the rule is open to a very telling objection. That reading would leave the party offering evidence with the option to structure a trial in whatever way would produce the maximum unfair prejudice consistent with relevance. He could choose the available alternative carrying the greatest threat of improper influence, despite the availability of less prejudicial but equally probative evidence. The worst he would have to fear would be a ruling sustaining a Rule 403 objection, and if that occurred, he could simply fall back to offering substitute evidence. This would be a strange rule. It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd.

Rather, a reading of the companions to Rule 403, and of the commentaries that went with them to Congress, makes it clear that what counts as the Rule 403 "probative value" of an item of evidence, as distinct from its Rule 401 "relevance," may be calculated by comparing evidentiary alternatives. The Committee Notes to Rule 401 explicitly say that a party's concession is pertinent to the court's discretion to exclude evidence on the point conceded. Such a concession, according to the Notes, will sometimes "call for the exclusion of evidence offered to prove [the] point conceded by the opponent" Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U. S. C. App., p. 859. As already mentioned, the Notes make it clear that such rulings should be made not on the basis of Rule 401 relevance but on "such considerations as waste of time and undue prejudice (see Rule 403)" *Ibid.* The Notes to Rule 403 then take up the point by stating that when a court considers "whether to exclude on grounds of unfair prejudice," the "availability of other means of proof may . . . be an appropriate factor." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U. S. C. App., p. 860. The point gets a reprise in the Notes to Rule 404(b), dealing with admissibility when a given evidentiary item has the dual nature of legitimate evidence of an element and illegitimate evidence of character: "No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under 403." Advisory Committee's Note on Fed. Rule Evid. 404, 28 U. S. C. App., p. 861. Thus the notes leave no question that when Rule 403 confers discretion by providing that evidence "may" be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives. See 1 McCormick 782, and n. 41 (suggesting that Rule 403's "probative value" signifies the "marginal probative value" of the evidence relative to the other evidence in the case); 22 C. Wright & K. Graham, *Federal Practice and Procedure* Section(s) 5250, pp. 546-547 (1978) ("The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point").

2.

In dealing with the specific problem raised by Section(s) 922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, for the reasons already given, but will be substantial whenever the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious, and Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, would take on added weight from the related assault charge against him. 8

The District Court was also presented with alternative, relevant, admissible evidence of the prior conviction by Old Chief's offer to stipulate, evidence necessarily subject to the District Court's consideration on the motion to exclude the record offered by the Government. Although Old Chief's formal offer to stipulate was, strictly, to enter a formal agreement with the Government to be given to the jury, even without the Government's acceptance his proposal amounted to an offer to admit that the prior-conviction element was satisfied, and a defendant's admission is, of course, good evidence. See Fed. Rule Evid. 801(d)(2)(A).

Old Chief's proffered admission would, in fact, have been not merely relevant but seemingly conclusive evidence of the element. The statutory language in which the prior-conviction requirement is couched shows no congressional concern

with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies, and Old Chief clearly meant to admit that his felony did qualify, by stipulating "that the Government has proven one of the essential elements of the offense." App. 7. As a consequence, although the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission. Logic, then, seems to side with Old Chief.

3.

There is, however, one more question to be considered before deciding whether Old Chief's offer was to supply evidential value at least equivalent to what the Government's own evidence carried. In arguing that the stipulation or admission would not have carried equivalent value, the Government invokes the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it. The authority usually cited for this rule is *Parr v. United States*, 255 F. 2d 86 (CA5), cert. denied, 358 U.S. 824 (1958), in which the Fifth Circuit explained that the "reason for the rule is to permit a party to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight." 255 F. 2d at 88 (quoting *Dunning v. Maine Central R. Co.*, 91 Me. 87, 39 A. 352, 356 (1897)).

This is unquestionably true as a general matter. The "fair and legitimate weight" of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal. When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault. Cf. *United States v. Gilliam*, 994 F. 2d 97, 100-102 (CA2), cert. denied, 510 U.S. 927 (1993).

But there is something even more to the prosecution's interest in resisting efforts to replace the evidence of its choice with admissions and stipulations, for beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about. "If [jurors' expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 Calif. L. Rev. 1011, 1019 (1978) (footnotes omitted). Expectations may also arise in jurors' minds simply from the experience of a trial itself. The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, "never mind what's behind the door," and jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way.

In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

4.

This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him. As in this case, the choice of evidence for such an element is usually not between eventful narrative and abstract proposition, but between propositions of slightly varying abstraction, either a record saying that conviction for some crime occurred at a certain time or a statement admitting the same thing without naming the particular offense. The issue of substituting one statement for the other normally arises only when the record of conviction would not be admissible for any purpose beyond proving status, so that excluding it would not deprive the prosecution of evidence with multiple utility; if, indeed, there were a justification for receiving evidence of the nature of prior acts on some issue other than status (i.e., to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," Fed. Rule Evid. 404(b)), Rule 404(b) guarantees the opportunity to seek its admission. Nor can it be argued that the events behind the prior conviction are proper nourishment for the jurors' sense of obligation to vindicate the public interest. The issue is not whether concrete details of the prior crime should come to the jurors' attention but whether the name or general character of that crime is to be disclosed. Congress, however, has made it plain that distinctions among generic felonies do not count for this purpose; the fact of the qualifying conviction is alone what matters under the statute. "A defendant falls within the category simply by virtue of past conviction for any [qualifying] crime ranging from possession of short lobsters, see 16 U.S.C. Section(s) 3372, to the most aggravated murder." *Tavares*, 21 F. 3d, at 4. The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instructions. Finally, the most obvious reason that the general presumption that the prosecution may choose its evidence is so remote from application here is that proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense. Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.

Given these peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other. In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available. 10 What we have said shows why this will be the general rule when proof of convict status is at issue, just as the prosecutor's choice will generally survive a Rule 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried.

The judgment is reversed, and the case is remanded to the Ninth Circuit for further proceedings consistent with this opinion. 11

It is so ordered.

Justice O'Connor, with whom The Chief Justice, Justice Scalia, and Justice Thomas join, dissenting.

The Court today announces a rule that misapplies Federal Rule of Evidence 403 and upsets, without explanation, longstanding precedent regarding criminal prosecutions. I do not agree that the Government's introduction of evidence that reveals the name and basic nature of a defendant's prior felony conviction in a prosecution brought under 18 U. S. C. Section(s) 922(g)(1) "unfairly" prejudices the defendant within the meaning of Rule 403. Nor do I agree with the Court's newly minted rule that a defendant charged with violating Section(s) 922(g)(1) can force the Government to accept his concession to the prior conviction element of that offense, thereby precluding the Government from offering evidence on this point. I therefore dissent.

I.

Rule 403 provides that a district court may exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Certainly, Rule 403 does not permit the court to exclude the Government's evidence simply because it may hurt the defendant. As a threshold matter, evidence is excludable only if it is "unfairly" prejudicial, in that it has "an undue tendency to suggest decision on an improper basis." Advisory Committee's Note on Fed. Rule Evid. 403, 28 U. S. C. App., p. 860; see, e.g., *United States v. Munoz*, 36 F. 3d 1229, 1233 (CA1 1994) ("The damage done to the defense is not a basis for exclusion; the question under Rule 403 is 'one of "unfair" prejudice-not of prejudice alone' ") (citations omitted), cert. denied sub nom. *Martinez v. United States*, 513 U. S. ___ (1995); *Dollar v. Long Mfg., N. C., Inc.*, 561 F. 2d 613, 618 (CA5 1977) (" '[U]nfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair' "), cert. denied, 435 U.S. 996 (1978). The evidence tendered by the Government in this case-the order reflecting petitioner's prior conviction and sentence for assault resulting in serious bodily injury, in violation of 18 U. S. C. Section(s) 1153 and 18 U. S. C. Section(s) 113(f) (1988 ed.)-directly proved a necessary element of the Section(s) 922(g)(1) offense, that is, that petitioner had committed a crime covered by Section(s) 921(a)(20). Perhaps petitioner's case was damaged when the jury discovered that he previously had committed a felony and heard the name of his crime. But I cannot agree with the Court that it was unfairly prejudicial for the Government to establish an essential element of its case against petitioner with direct proof of his prior conviction.

The structure of Section(s) 922(g)(1) itself shows that Congress envisioned jurors' learning the name and basic nature of the defendant's prior offense. Congress enacted Section(s) 922(g)(1) to prohibit the possession of a firearm by any person convicted of "a crime punishable by imprisonment for a term exceeding one year." Section 922(g)(1) does not merely prohibit the possession of firearms by "felons," nor does it apply to all prior felony convictions. Rather, the statute exclude from Section(s) 922(g)(1)'s coverage certain business crimes and state misdemeanors punishable by imprisonment of two years or less. Section(s) 921(a)(20). Within the meaning of Section(s) 922(g)(1), then, "a crime" is not an abstract or metaphysical concept. Rather, the Government must prove that the defendant committed a particular crime. In short, under Section(s) 922(g)(1), a defendant's prior felony conviction connotes not only that he is a prior felon, but also that he has engaged in specific past criminal conduct.

Even more fundamentally, in our system of justice, a person is not simply convicted of "a crime" or "a felony." Rather, he is found guilty of a specified offense, almost always because he violated a specific statutory prohibition. For example, in the words of the order that the Government offered to prove petitioner's prior conviction in this case, petitioner "did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury, in violation of Title 18 U. S. C. Section(s) 1153 and 113(f)." App. 18. That a variety of crimes would have satisfied the prior conviction element of the Section(s) 922(g)(1) offense does not detract from the fact that petitioner committed a specific offense. The name and basic nature of petitioner's crime are inseparable from the fact of his earlier conviction and were therefore admissible to prove petitioner's guilt.

The principle is illustrated by the evidence that was admitted at petitioner's trial to prove the other element of the Section(s) 922(g)(1) offense-possession of a "firearm." The Government submitted evidence showing that petitioner possessed a 9mm semiautomatic pistol. Although petitioner's possession of any number of weapons would have satisfied the requirements of Section(s) 922(g)(1), obviously the Government was entitled to prove with specific evidence that petitioner possessed the weapon he did. In the same vein, consider a murder case. Surely the Government can submit proof establishing the victim

identity, even though, strictly speaking, the jury has no "need" to know the victim's name, and even though the victim might be a particularly well loved public figure. The same logic should govern proof of the prior conviction element of the Section(s) 922(g)(1) offense. That is, the Government ought to be able to prove, with specific evidence, that petitioner committed a crime that came within Section(s) 922(g)(1)'s coverage.

The Court never explains precisely why it constitutes "unfair" prejudice for the Government to directly prove an essential element of the Section(s) 922(g)(1) offense with evidence that reveals the name or basic nature of the defendant's prior conviction. It simply notes that such evidence may lead a jury to conclude that the defendant has a propensity to commit crime, thereby raising the odds that the jury would find that he committed the crime with which he is currently charged. With a nod to the part of Rule 404(b) that says "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," the Court writes:

"There is, accordingly, no question that propensity is an 'improper basis' for conviction and that evidence of a prior conviction is subject to analysis for probative value and for prejudicial risk of misuse as propensity evidence." Ante, at 9.

A few pages later, it leaps to the conclusion that there can be "no question that evidence of the name or nature of the prior offense carries a risk of unfair prejudice to the defendant." Ante, at 13.

Yes, to be sure, Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But Rule 404(b) does not end there. It expressly contemplates the admission of evidence of prior crimes for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The list is plainly not exhaustive, and where, as here, a prior conviction is an element of the charged offense, neither Rule 404(b) nor Rule 403 can bar its admission. The reason is simple: In a prosecution brought under Section(s) 922(g)(1), the Government does not submit evidence of a past crime to prove the defendant's bad character or to "show action in conformity therewith." It tenders the evidence as direct proof of a necessary element of the offense with which it has charged the defendant. To say, as the Court does, that it "unfairly" prejudices the defendant for the Government to establish its Section(s) 922(g)(1) case with evidence showing that, in fact, the defendant did commit a prior offense misreads the Rules of Evidence and defies common sense.

Any incremental harm resulting from proving the name or basic nature of the prior felony can be properly mitigated by limiting jury instructions. Federal Rule of Evidence 105 provides that when evidence is admissible for one purpose, but not another, "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Indeed, on petitioner's own motion in this case, the District Court instructed the jury that it was not to "consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." Brief for United States 32. The jury is presumed to have followed this cautionary instruction, see *Shannon v. United States*, 512 U.S. 573, ___ (1994), and the instruction offset whatever prejudice might have arisen from the introduction of petitioner's prior conviction.

II.

The Court also holds that, if a defendant charged with violating Section(s) 922(g)(1) concedes his prior felony conviction, district court abuses its discretion if it admits evidence of the defendant's prior crime that raises the risk of a verdict "tainted by improper considerations." See ante, at 1. Left unexplained is what, exactly, it was about the order introduced by the Government at trial that might cause a jury to decide the case improperly. The order offered into evidence (which the Court nowhere in its opinion sets out) stated, in relevant part:

"And the defendant having been convicted on his plea of guilty of the offense charged in Count II of the indictment in the above-entitled cause, to-wit: That on or about the 18th day of December 1988, at Browning, in the State and District of Montana, and on and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian country, JOHNNY LYNN OLD CHIEF, an Indian person, did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury, in violation of Title 18 U. S. C. Section(s) 1153 and 113(f)." App. 18.

The order went on to say that petitioner was sentenced for a term of 60 months' imprisonment, to be followed by two years of supervised release.

Why, precisely, does the Court think that this item of evidence raises the risk of a verdict "tainted by improper considerations"? Is it because the jury might learn that petitioner assaulted someone and caused serious bodily injury? If this is what the Court means, would evidence that petitioner had committed some other felony be admissible, and if so, what sort of crime might that be? Or does the Court object to the order because it gave a few specifics about the assault, such as the date, the location, and the victim's name? Or perhaps the Court finds that introducing the order risks a verdict "tainted by improper considerations" simply because the Section(s) 922(g)(1) charge was joined with counts charging petitioner with using a firearm in relation to a crime of violence, in violation of 18 U. S. C. Section(s) 924(c), and with committing an assault with a dangerous weapon, in violation of 18 U. S. C. Section(s) 1153 and 18 U. S. C. Section(s) 113(c) (1988 ed.)? Under the Court's nebulous standard for admission of prior felony evidence in a Section(s) 922(g)(1) prosecution, these are open questions.

More troubling still is the Court's retreat from the fundamental principle that in a criminal prosecution the Government may prove its case as it sees fit. The Court reasons that, in general, a defendant may not stipulate away an element of a charged offense because, in the usual case, "the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story." Ante, at 18. The rule has, however, "virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." Ibid. Thus, concludes the Court, there is no real difference between the "evidentiary significance" of a defendant's concession and that of the Government's proof of the prior felony with the order of conviction. Ante, at 19. Since the Government's method of proof was more prejudicial than petitioner's admission, it follows that the District Court should not have admitted the order reflecting his conviction when petitioner had conceded that element of the offense. Ibid.

On its own terms, the argument does not hold together. A jury is as likely to be puzzled by the "missing chapter" resulting from a defendant's stipulation to his prior felony conviction as it would be by the defendant's conceding any other element of the crime. The jury may wonder why it has not been told the name of the crime, or it may question why the defendant's firearm possession was illegal, given the tradition of lawful gun ownership in this country, see *Staples v. United States*, 51 U.S. 600, 610-612 (1994). "Doubt as to the criminality of [the defendant's] conduct may influence the jury when it considers the possession element." *United States v. Barker*, 1 F. 3d 957, 960 (1993) (quoting *United States v. Collamore*, 868 F. 2d 24, 28 (CA1 1989)), modified, 20 F. 3d 365 (CA9 1994).

Second, the Court misapprehends why "it has never been seriously suggested that [a defendant] can . . . compel the Government to try the case by stipulation." *Singer v. United States*, 380 U.S. 24, 35 (1965). It may well be that the prosecution needs "evidentiary depth to tell a continuous story" in order to prove its case in a way a jury will accept. Ante, at 18. But that is by no means the only or the most important reason that a defendant may not oblige the Government to accept his concession to an element of the charged offense. The Constitution requires a criminal conviction to rest upon a jury determination that the defendant is guilty of every element of the crime of which he is charged beyond a reasonable doubt. *United States v. Gaudin*, 515 U. S. ___, ___ (1995) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993)); see also *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 156 (1979) ("[I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt"). "A simple plea of not guilty, Fed. Rule Crim. Proc. 11, puts the prosecution to its proof as to all elements of the crime charged . . ." *Mathews v. United States*, 485 U.S. 58, 64-65 (1988). Further, a defendant's tactical decision not to contest an essential element of the crime does not remove the prosecution's burden to prove that element. *Estelle v. McGuire*, 502 U.S. 62, 69 (1991). At trial, a defendant may thus choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element.

It follows from these principles that a defendant's stipulation to an element of an offense does not remove that element from the jury's consideration. The usual instruction regarding stipulations in a criminal case reflects as much: "When the attorneys on both sides stipulate or agree as to the existence of a fact, you may accept the stipulation as evidence and regard that fact as proved. You are not required to do so, however, since you are the sole judge of the facts." 1 E. Devitt, C. Blackmar, M. Wolff, & K. O'Malley, *Federal Jury Practice and Instructions* Section(s) 12.03, p. 333 (4th ed. 1992). Obviously, we are not dealing with a stipulation here. A stipulation is an agreement, and no agreement was reached between petitioner and the Government in this case. Does the Court think a different rule applies when the defendant

attempts to stipulate, over the Government's objection, to an element of the charged offense? If so, that runs counter to the Constitution: The Government must prove every element of the offense charged beyond a reasonable doubt, *In re Winship* 397 U.S. 358, 361 (1970), and the defendant's strategic decision to "agree" that the Government need not prove an element cannot relieve the Government of its burden, see *Estelle*, supra, at 69-70. Because the Government bears the burden of proof on every element of a charged offense, it must be accorded substantial leeway to submit evidence of its choosing to prove its case.

Also overlooked by the Court is the fact that, in "conceding" that he has a prior felony conviction, a defendant may be trying to take the issue from the jury altogether by effectively entering a partial plea of guilty, something we have never before endorsed. Federal Rule of Criminal Procedure 23(a) does not permit a defendant to waive a jury trial unless the Government consents, and we have upheld the provision as constitutional. *Singer*, supra, at 37. "The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." 380 U.S., at 36. A defendant who concedes the prior conviction element of the Section(s) 922(g)(1) offense may be effectively trying to waive his right to a jury trial on that element. Unless the Government agrees to this waiver, it runs afoul of Rule 23(a) and *Singer*.

III.

The Court manufactures a new rule that, in a Section(s) 922(g)(1) case, a defendant can force the Government to accept his admission to the prior felony conviction element of the offense, thereby precluding the Government from offering evidence to directly prove a necessary element of its case. I cannot agree that it "unfairly" prejudices a defendant for the Government to prove his prior conviction with evidence that reveals the name or basic nature of his past crime. Like it or not, Congress chose to make a defendant's prior criminal conviction one of the two elements of the Section(s) 922(g)(1) offense. Moreover, crimes have names; a defendant is not convicted of some indeterminate, unspecified "crime." Nor do I think that Federal Rule of Evidence 403 can be read to obviate the well accepted principle, grounded in both the Constitution and in our precedent, that the Government may not be forced to accept a defendant's concession to an element of a charged offense as proof of that element. I respectfully dissent.

Footnotes

[Footnote 1] The standard of review applicable to the evidentiary rulings of the district court is abuse of discretion. *United States v. Abel*, 469 U.S. 45, 54-55 (1984).

[Footnote 2] Proposals for instructing the jury in this case proved to be perilous. We will not discuss Old Chief's proposed instruction beyond saying that, even on his own legal theory, revision would have been required to dispel ambiguity. The jury could not have said whether the instruction that Old Chief had been convicted of a crime punishable by imprisonment for more than one year meant that, as a matter of law, his conviction fell within the definition of "crime punishable by imprisonment for a term exceeding one year," or was instead merely a statement of fact, in which case the jurors could not have determined whether the predicate offense was within one of the statute's categorical exceptions, a "state . . . misdemeanor . . . punishable by a term . . . of two years or less" or a "business" crime. The District Court did not however, deny Old Chief's motion because of the artless instruction he proposed, but because of the general rule, to be discussed below, that permits the Government to choose its own evidence.

While Old Chief's proposed instruction was defective even under the law as he viewed it, the instruction actually given was erroneous even on the Government's view of the law. The District Court charged, "You have also heard evidence that the defendant has previously been convicted of a felony. You may consider that evidence only as it may affect the defendant's believability as a witness. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." App. 31. This instruction invited confusion. First, of course, if the jury had applied it literally there would have been an acquittal for the wrong reason: Old Chief was on trial for, among other offenses, being a felon in possession, and if the jury had not considered the evidence of prior conviction it could not have found that he was a felon. Second, the remainder of the instruction referred to an issue that was not in the case. While it is true that prior-offense evidence may in a proper case be admissible for impeachment, even if for no other purpose, Fed. Rule Evid. 609, petitione

did not testify at trial; there was no justification for admitting the evidence for impeachment purposes and consequently no basis for the District Court's suggestion that the jurors could consider the prior conviction as impeachment evidence. The fault for this error lies at least as much with Old Chief as with the District Court, since Old Chief apparently sought some such instruction and withdrew the request only after the court had charged the jury.

[Footnote 3] "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Fed. Rule Evid. 402.

[Footnote 4] Viewing evidence of the name of the prior offense as relevant, there is no reason to dwell on the Government's argument that relevance is to be determined with respect to the entire item offered in evidence (here, the entire record of conviction) and not with reference to distinguishable sub-units of that object (here, the name of the offense and the sentence received). We see no impediment in general to a district court's determination, after objection, that some sections of a document are relevant within the meaning of Rule 401, and others irrelevant and inadmissible under Rule 402.

[Footnote 5] Petitioner also suggests that we might find a prosecutor's refusal to accept an adequate stipulation and jury instruction in the narrow context presented by this case to be prosecutorial misconduct. The argument is that, since a prosecutor is charged with the pursuit of just convictions, not victory by fair means or foul, any ethical prosecutor must agree to stipulate in the situation here. But any ethical obligation will depend on the construction of Rule 403, and we have no reason to anticipate related ethical lapses once the meaning of the rule is settled.

[Footnote 6] It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight. See, for example, *United States v. O'Shea*, 724 F. 2d 1514, 1517 (CA11 1984) where the appellate court approved the trial court's pretrial refusal to impose a stipulation on the Government and exclude the Government's corresponding evidence of past convictions because the trial court had found at that stage that the evidence would quite likely come in anyway on other grounds.

[Footnote 7] While our discussion has been general because of the general wording of Rule 403, our holding is limited to cases involving proof of felon status. On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon.

[Footnote 8] It is true that a prior offense may be so far removed in time or nature from the current gun charge and any others brought with it that its potential to prejudice the defendant unfairly will be minimal. Some prior offenses, in fact, may even have some potential to prejudice the Government's case unfairly. Thus an extremely old conviction for a relatively minor felony that nevertheless qualifies under the statute might strike many jurors as a foolish basis for convicting an otherwise upstanding member of the community of otherwise legal gun possession. Since the Government could not, of course, compel the defendant to admit formally the existence of the prior conviction, the Government would have to bear the risk of jury nullification, a fact that might properly drive the Government's charging decision.

[Footnote 9] Cf. Green, "The Whole Truth?": How Rules of Evidence Make Lawyers Deceitful, 25 *Loyola (LA) L. Rev.* 699, 703 (1992) ("[E]videntiary rules . . . predicated in large measure on the law's distrust of juries [can] have the unintended, and perhaps ironic, result of encouraging the jury's distrust of lawyers. The rules do so by fostering the perception that lawyers are deliberately withholding evidence" (footnote omitted)). The fact that juries have expectations as to what evidence ought to be presented by a party, and may well hold the absence of that evidence against the party, is also recognized in the case law of the Fifth Amendment, which explicitly supposes that, despite the venerable history of the privilege against self-incrimination, jurors may not recall that someone accused of crime need not explain the evidence or avow innocence beyond making his plea. See, e.g., *Lakeside v. Oregon*, 435 U.S. 333, 340, and n. 10 (1978). The assumption that jurors may have contrary expectations and be moved to draw adverse inferences against the party who disappoints them undergirds the rule that a defendant can demand an instruction forbidding the jury from drawing such an inference.

[Footnote 10] There may be yet other means of proof besides a formal admission on the record that, with a proper

objection, will obligate a district court to exclude evidence of the name of the offense. A redacted record of conviction is the one most frequently mentioned. Any alternative will, of course, require some jury instruction to explain it (just as it will require some discretion when the indictment is read). A redacted judgment in this case, for example, would presumably have revealed to the jury that Old Chief was previously convicted in federal court and sentenced to more than a year's imprisonment, but it would not have shown whether his previous conviction was for one of the business offenses that do not count, under Section(s) 921(a)(20). Hence, an instruction, with the defendant's consent, would be necessary to make clear that the redacted judgment was enough to satisfy the status element remaining in the case. The Government might, indeed, propose such a redacted judgment for the trial court to weigh against a defendant's offer to admit, as indeed the government might do even if the defendant's admission had been received into evidence.

[Footnote 11] In remanding, we imply no opinion on the possibility of harmless error, an issue not passed upon below.

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